Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-840

THOMAS C. BORING, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi

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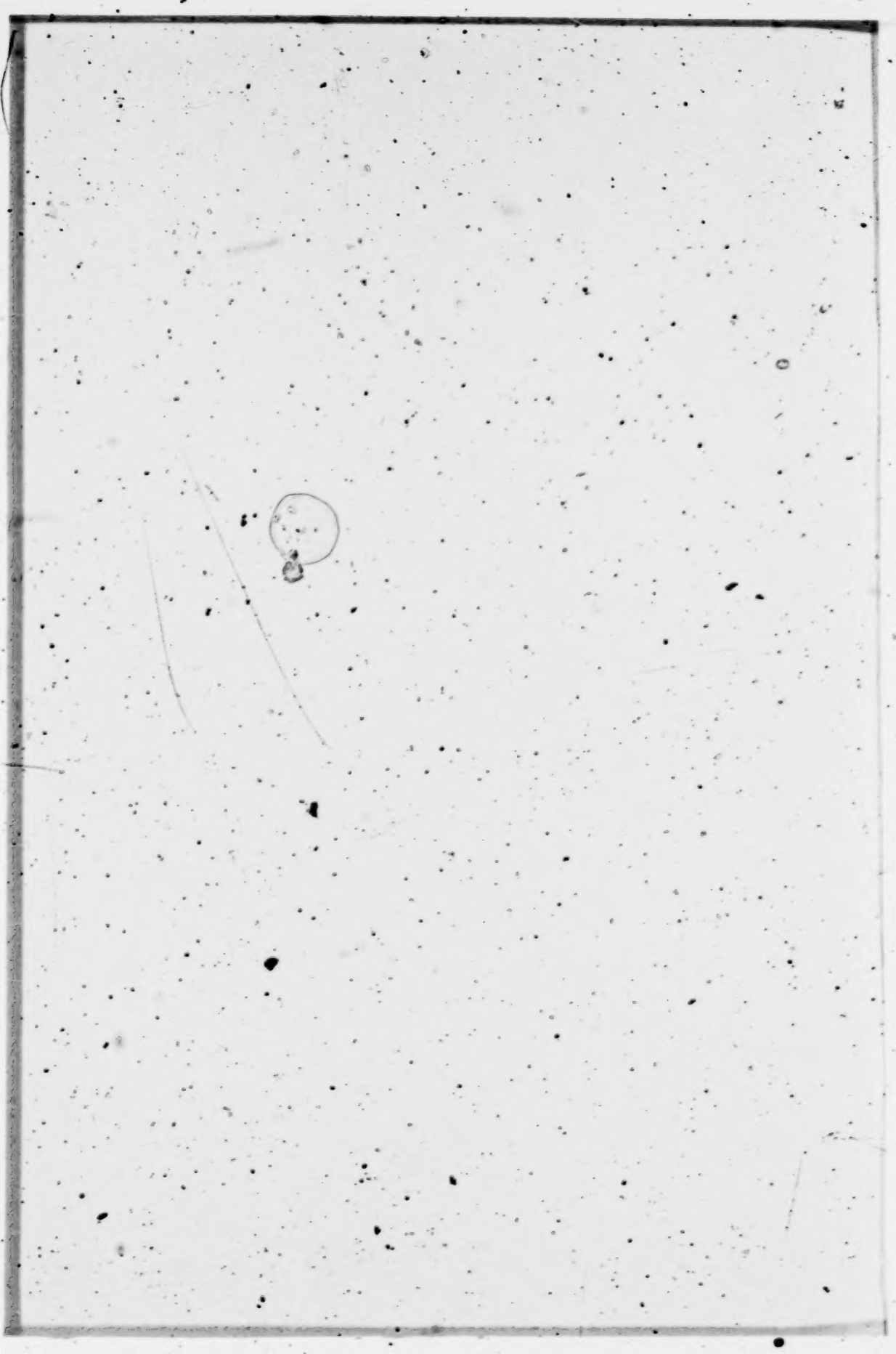

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In Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi

INTRODUCTORY STATEMENT

The petitioner, Thomas C. Boring, Jr., was convicted in the Circuit Court of Leflore County, Mississippi of the crime of possession of marijuana and was sentenced to serve a term of three and one-half years in the Mississippi State Penitentiary at Parchman, Mississippi and to pay a fine of $1,000.00.

On September 27, 1971 the Mississippi Supreme Court affirmed this judgment of conviction in Boring v. State, 253 So. 2d 251, a copy of the Opinion of the Mississippi

Supreme Court is appended, bound with this Brief, and marked Appendix "A".

The Petition for Rehearing filed on behalf of the petitioner was denied by the Mississippi Supreme Court on October 25, 1971.

JURISDICTIONAL STATEMENT

Respondent concedes that this Court has jurisdiction to review the decision by Writ of Certiorari by virtue of Section 1257(3), Title 28, U. S. C.

QUESTIONS PRESENTED FOR REVIEW

Did the affidavit for a search warrant establish probable cause for the issuance of the search warrant?

STATEMENT OF THE CASE

At the March 1970 Term of Court, the Leflore County Grand Jury returned a true bill against the petitioner and Mona Citro, charging that on January 31, 1970, they had had in their possession four pounds of marijuana. At the same term of Court, the petitioner was arraigned and entered a plea of not guilty. On March 13, 1970, the petitioner's attorney filed a Sworn Motion to Suppress Evidence. In summary, the grounds alleged for the granting of the Motion by the petitioner were that the affidavit for the search warrant did not furnish probable cause for the issuance of the warrant, that the warrant itself was insufficient, that the warrant was illegally executed, and that the information upon which the warrant was based was obtained in an illegal manner. The petitioner in his Motion requested an evidentiary hearing to determine the admissibility of the evidence. On March 16, 1970, a hearing was held on the motion. The following testimony was presented at that hearing:

Ronnie L. White, an investigator with the Mississippi Highway Patrol, Narcotic Division, testified that he had been with the patrol since 1964 and with the Narcotic Division since 1968. Mr. White testified that in January of 1970, he was in Greenwood, Mississippi investigating a marijuana case. On January 31, 1971, Mr. White executed an affidavit for a search warrant before C. C. Williamson, Justice of the Peace, District 3, Leflore County. Mr. White testified that he typed up an original of the affidavit and an original and one copy of the search warrant at the Mississippi Highway Patrol Substation in Greenwood, Mississippi. Mr. White personally went before Justice of the Peace Williamson. He was sworn and related the facts set forth in the affidavit. Mr. White gave further testimony before Justice of the Peace Williamson regarding the reliability of his informer. He told Mr. Williamson that he had determined for himself the character of the informer and that the informer had given him information concerning narcotics in Leflore County in the past which had proved to be true and correct. Mr. White testified that it is the normal practice of the Narcotic Division to run a background check on people from whom they receive information to determine if they have good moral character and to determine their standing in the community. Mr. White also told Justice of the Peace Williamson about getting a sample of marijuana from the residence of the petitioner. Mr. White testified that the sample of marijuana had been received recently before he had filed the affidavit. About 6:00 A. M., Justice of the Peace Williamson signed all three documents and put his seal on the search warrant. Mr. White left the affidavit with the Judge and carried the original and copy of the search warrant with him. After Mr. White got the search warrant, he proceeded to petitioner's house. We went to the door leading from the garage into the house. After he had knocked several times, the petitioner came to the door.

Mr. White identified himself as a police officer with a search warrant. However, the petitioner refused him entry. After Mr. White had told the petitioner the third time and the petitioner still refused him entry, entry was made by force. Inside the door leading from the garage into the den immediately upon entering, Mr. White served a copy of the search warrant on the petitioner. Mr. White testified that he handed the copy of the search warrant to the petitioner who took the copy from him. When the officers had kicked in the door, the petitioner had gotten a small abrasion on the side of his head. On first entering the house, Mr. White testified he observed marijuana on the den floor. The house was searched thoroughly by Mr. White, Investigator Bill Townsend, Investigator J. K. Lloyd, Administrative Assistant Charles Snodgrass, Chief Curtis Lary, Detective W. W. Smith and Detective Eloyd Peeples. Mr. White testified that he had not gotten any information regarding the marijuana from the Greenwood Police. Mr. White denied that he had sent the informer to the petitioner's residence. He further testified that he had no knowledge of any law enforcement officer sending the informer to the petitioner's house. Mr. White testified that at the time the house was searched, Mona Citro was living in the house with the petitioner. Mr. White testified that he did not observe or know anything about some holes in the appellant's fence. Mr. White further testified that a complete inventory was made of everything that was taken from the petitioner's residence. The inventory was attached to the original of the search warrant and returned to Justice of the Peace Williamson.

Curtis Lary, Chief of the Greenwood Police, testified that he participated in the search of petitioner's residence on the morning of January 31, 1970. Chief Lary was about eight to ten feet from the door when Mr. White knocked. Mr. Lary observed Mr. White kicking in the door. Chief Lary testified that he immediately entered the house.

Other Greenwood officers participating in the search were Lt. Floyd Peeples and Detective W. W. Smith. After the house had already been entered, a couple of other Greenwood officers, including Captain Cecil Floyd, joined them. Mr. Lary testified that he did not see Mr. White with the warrant in the house, but he knew that Mr. White had the warrant when he went in. He testified that he did not see anyone serve the appellant with a search warrant, but admitted that he was not concerned with observing this because he knew that Mr. White would take care of it. Chief Lary testified that he did not know anything about any holes in the petitioner's fence.

Charles Snodgrass, Administrative Assistant Director of the Narcotics Division, testified that he participated in the search of the petitioner's residence on January 31, 1970. Mr. Snodgrass testified that Mr. White knocked on the door. He testified that Mr. White had a warrant. Mr. Snodgrass did not help Mr. White prepare the search warrant. He did not go to Justice of the Peace Williamson's house with Mr. White. Mr. Snodgrass testified that Mr. White knocked on the petitioner's door three times, announced that they were the police, and asked petitioner to open the door. When the petitioner would not open the door, Mr. White pushed the door open with his body. Mr. Snodgrass testified that he entered the house right behind Mr. White. Mr. Snodgrass saw Mr. White hand the search warrant to the petitioner. However, Mr. Snodgrass did not stop to see if the petitioner took the search warrant. Mr. Snodgrass testified that he did not know anything about any holes in the petitioner's fence. Mr. Snodgrass further testified that he did not know the name of the informer.

C. C. Williamson, Justice of the Peace, Beat 3, Leflore County, Mississippi, testified that he issued a search warrant for the residence of Dr. Tom Boring in the early hours of January 31, 1970. He testified that he remem-

bered signing three different papers, an affidavit and two search warrants. He did not recall whether he put his seal on any of the papers or not. At the conclusion of all of the testimony, the court held that the affidavit and the evidence presented furnished sufficient probable cause for the issuance of a search warrant by the Justice of the Peace. On March 16, 1970, the court entered an order overruling the petitioner's Motion to Suppress Evidence. The cause was then continued until the next term of court. The trial was set for Tuesday morning, June 23, 1970 at 9:00 A. M. However, neither the petitioner, nor his attorneys appeared when the case was called. A bond forfeiture was taken, and an arrest warrant was issued for the petitioner and Mona Citro. The trial was then set for Tuesday, November 17, 1970 at 9:00 A. M. Voir dire examination was completed on November 17th and testimony began on November 18, 1970.

The following testimony was given by witnesses for the State of Mississippi:

Ronnie White, an investigator for the Mississippi Highway Patrol assigned to the Narcotic Division, testified that in January of 1970 he made an investigation in Greenwood, Mississippi. On January 31, 1970 Mr. White went to Judge C. C. Williamson's residence in Greenwood for the purpose of obtaining a search warrant. Mr. White identified the affidavit for the search warrant for the residence of the petitioner in Greenwood. Mr. White also identified the search warrant which he obtained for the petitioner's residence. After obtaining the search warrant, Mr. White went to petitioner's residence arriving there at approximately 6:50 A. M. on January 31. Mr. White was accompanied by Charles Snodgrass, Administrative Assistant of the Highway Patrol, Investigator Bill Townsend, Investigator Joe Lloyd, Chief of Police Curtis Lary, Detective W. W. Smith, and Detective Floyd Peeples. Mr. White testified that he had been in charge of the search.

Mr. White went to the door which led from the garage into the dining room. He knocked several times. After a few minutes the petitioner came to the door and peered out. Mr. White advised him that it was the police with a search warrant. The petitioner refused to let them in. After Mr. White had advised petitioner for the third time, he forced an entry through the door. The petitioner was struck when the door was forced open. Immediately after entering the petitioner's residence, Mr. White served a carbon copy of the search warrant on petitioner. Immediately after serving the search warrant on petitioner, Mr. White observed a substance on the den floor that had the color and appearance of marijuana. Mr. White testified that he had been a narcotic agent for two years and had been in daily contact with marijuana. Immediately after observing the substance on the den floor, Mr. White placed petitioner under arrest for possession of marijuana. Two pictures of the scene in petitioner's den were introduced into evidence and are included in the record. Mr. White made the inventory and return for the search warrant. All of the articles from the house were dated and initialed and kept by Mr. White in his possession until he turned them over to Herman Parrish at the Mississippi Crime Laboratory for analysis. Mr. White told Mr. Parrish that the items had come from Thomas Chester Boring, Jr.'s residence in Greenwood. After placing the petitioner under arrest, Mr. White read to him his rights from a Miranda card. The petitioner was advised that he had the right to remain silent, that anything he said would be used against him in a court of law, that he had the right to an attorney before answering any questions, that if he could not afford one, one would be furnished to him before questioning, and that he could stop talking and request an attorney at any time. Mr. White also read to the petitioner the waiver which was printed on the card. The petitioner stated that he understood his rights. He knew who the men were and what he was being arrested for. Mr. White testi-

fied that he did not do anything to induce the petitioner to make any statement. He did not offer him a hope or promise of reward. He did not coerce the petitioner in any manner. The petitioner made certain statements freely and voluntarily without anyone asking him to do so. The petitioner stated, "You caught me redhanded." He also said, "I'm guilty, it is mine." He stated to Mr. White, "There are four pounds there, two different kinds." He also stated, "I paid a hundred dollars a pound." As far as Mr. White knew, no other person present in the house heard the petitioner make these statements. Mr. White did not ask the petitioner to make a written statement. Mr. White testified that he did not ever question the petitioner. Also arrested at the time was Mona Citro, who resided in the petitioner's house in Leflore County, Mississippi. Mr. White testified that neither of the defendants offered any resistance or attempted to interfere with the search.

Herman Parrish, chemist, criminalist and toxicologist with the Mississippi Crime Laboratory, testified that when he is attempting to determine if a substance is marijuana, he first looks at the leaf under a microscope. A marijuana leaf has a characteristic appearance. In addition, when marijuana is placed in a highly purified hydrochloric acid, it gives off carbon dioxide. Another test which is run to determine whether or not a substance is marijuana is the Duquesnois test. In this test petroleum ether is shaken with a leaf fragment. The petroleum ether takes out the active material of marijuana, tetrahydro cannabinols. The ether is separated and allowed to evaporate. Then the residue or material that is left is taken up in the Duquesnois solution. If tetrahydro cannabinols are present, a blue to purple color appears when the mixture is shaken. An additional test for marijuana is to add chloroform to the solution. The chloroform forms a lower layer. When the solution is shaken, the blue to purple color goes to the lower level. Another way to test for marijuana is by taking the residue from the petroleum ether and injecting it

into a gas chromatograph, which separates the substance into its active materials. If tetrahydro cannabinols are present, they can be identified. On January 31, 1970, Mr. Parrish received from Ronnie White a number of items which had been taken from the home of petitioner Thomas Chester Boring, Jr. A number was assigned to and an analysis made of each item. The State had marked for identification Exhibits A through T. Mr. Parrish testified that Exhibit "A", a red carpet, had marijuana scattered over its surface. Exhibit "B", a paper bag, contained marijuana. Exhibits "C" and "C" were also additional bags containing marijuana. Exhibit "C" was a water pipe in which tetrahydro Cannabinols were found, indicating that marijuana had been smoked in the pipe. Exhibits "F", "G", "H", "I" and "J" were additional pipes in which marijuana had been smoked. Exhibit "K" was a match box of marijuana. Exhibit "L" was a piece of paper containing marijuana. Exhibit "M" was colander, which had contained leaf and stem parts of marijuana. Exhibit "N" was a sifter which contained leaf fragments of marijuana. Exhibit "O" was a Fresh-O-Lator which had contained marijuana. Exhibit "P" was the marijuana which had been removed from the Fresh-O-Lator. Exhibit "Q" was marijuana taken from the sifter which had previously been introduced as Exhibit "N". Exhibit "R" was a jacket. Marijuana had been found in the gleanings in the pocket of the jacket. A pipe also found in the jacket pocket had marijuana in the bowl. Exhibit "S" was a blue medicine bottle labeled "Quiet World", which also contained marijuana. Exhibit "T" was a drawstring bag containing marijuana. Mr. Parrish testified that he identified some four pounds of marijuana. Mr. Parrish stated that the identification for marijuana is scientific and positive.

Ronnie White again took the stand and identified the items which had been marked Exhibits "A" through "T" for identification only. Mr. White identified his initials on each of the items. He testified that the items had all

come from the petitioner's residence on January 31, 1970. He testified that he had taken the items to Herman Parrish for analysis. The items were introduced into evidence as State's collective Exhibit "6".

At this point in the testimony the State rested. The petitioner made a motion to exclude the evidence and for a directed verdict. He also renewed his motion to exclude the items seized on the grounds that they were the result of an unlawful search and seizure as previously stated in his Motion to Suppress Evidence. The petitioner's motions were overruled.

Mona Citro, who was called as the only witness for petitioner, testified that she had been indicted along with the petitioner for the unlawful possession of marijuana. She testified that at the time of petitioner's trial, she had not yet been tried on the charge. Miss Citro was shown the coat which had been introduced into evidence and was asked if it was her sole property. Miss Citro replied that she refused to answer on the grounds that it might tend to incriminate her.

The jury then retired. The State objected to the defense asking questions solely to elicit from the witness the statement that she would not answer on the grounds that it might tend to incriminate her. Miss Citro refused to answer the same question out of the jury's presence. Miss Citro was then shown the State's collective Exhibit "6". She was asked if the items in the exhibit were her sole property and under her sole possession and control. Miss Citro again refused to answer on the grounds that it might tend to incriminate her. Miss Citro testified that she had discussed the whole matter with her attorney, W. S. Moore, and had decided not to testify as to anything that might have to do with the facts of the case. Miss Citro had previously related this fact to her attorney. The trial court sustained the State's objection to the testimony of this witness. At this point the defense rested.

ARGUMENT

The underlying facts and circumstances set forth in the affidavit for the search warrant is set out in its entirety in the Opinion of the Mississippi Supreme Court, which is Appendix "A" to the Brief of the Respondent. Contrary to what is urged by the petitioner in his brief, the affidavit in the case at bar does meet the requirements of "probable cause" as set forth in **Aguilar v. Texas**, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964), and **Spinelli v. United States**, 393 U.S. 14, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969).

The decision in **Aguilar v. Texas**, supra, provides the foundation for the later case law on the question which the petitioner raises under this proposition in his brief. The relevant part of the affidavit in the **Aguilar** case, supra, is as follows:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law. 378 U.S. at 109, 84 S. Ct. 1511, 12 L. Ed. 2d at 725.

In an opinion reversing a judgment of the Texas Court of Criminal Appeals, this Court stated:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be dis-

closed . . . was "credible" or his information "reliable". 378 U.S. at 114, 84 S. Ct. 1514, 12 L. Ed. 2d at 729.

The **Spinelli** case, supra, reaffirms and clarifies the rule set forth earlier in **Aguilar v. Texas**, supra. The affidavit in **Spinelli**, supra, set forth that the F. B. I. had observed the appellant over a five-day period, that on four different days they had seen him go to the parking lot of a particular apartment building and on the fifth day enter an apartment in the building, that the apartment which he had entered had two phones, that the appellant had been known in the past to be a bookmaker, and finally that they "had been informed by a confidential reliable informant" that Spinelli was using the two phones to take wagers. This Court felt that there was nothing so unusual about the activities of Spinelli as to support the assertion that he was engaged in gambling activities. The Court further held that the warrant was improperly issued upon the tip of the confidential informant uncorroborated by independent sources. The reason given for this holding was that the informant was not shown to be reliable and that the tip did not contain sufficient details of the manner in which the information was gathered or, in the alternative, a sufficiently detailed description of the accused's criminal activity.

Following this case, the Mississippi Supreme Court in **O'Bean v. State**, 184 So.2d 635 (Miss. 1966), specifically adopted the decision in **Aguilar**, supra. In **O'Bean**, supra, a police officer made an affidavit which stated:

> He has reason to believe, and does believe, that intoxicating liquors are being * * * sold * * * and this belief is not feigned or malice against the said occupants but is founded on creditable information in that the affiant has been informed by a creditable person that such are the facts * * *. 184 So. 2d at 637.

The Mississippi Supreme Court found that this affidavit was insufficient under the rule set out in **Aguilar**, supra, and in so doing stated:

> The standard required by Aguilar, which we are obliged to follow, is that an affidavit seeking a search warrant, though it may be based on hearsay information and need not reflect the direct personal observations of the affiant, must contain some of the underlying facts or circumstances from which a detached and neutral judge can fairly ascertain that probable cause does exist for the issuance of the warrant. 184 So. 2d at 638.

The ruling in **O'Bean**, supra, has since been expanded and explained in numerous other cases by the Mississippi Supreme Court: **Barker v. State**, 241 So. 2d 455 (Miss. 1970), and **Strode v. State**, 231 So. 2d 779 (Miss. 1970).

In **Strode v. State**, supra, the Mississippi Supreme Court held:

> The two-part test of Aguilar requires a magistrate to be informed of (1) some of the underlying circumstances from which the informer concluded that the defendant was the one guilty of the offense, and (2) some of the underlying circumstances from which the officer concluded that the informer was credible or his information reliable. In short, under the basis-of-knowledge test, the informer must have obtained his knowledge by personal observation or in some other dependable manner rather than through casual rumor. The second reliability test is an attempt to guard against tips provided by untruthful or unreliable informers, and suggests that an informer is creditable if he has provided truthful tips in the past. Moreover, the information may be deemed reliable if corroborated by independent investigation. Both tests

require only that some of the underlying circumstances be sworn to. Furthermore, in Spinelli, the Court indicated that the basis-of-knowledge test could be fulfilled without a statement of the circumstances from which the informer derived his information: i. e., if a tip is sufficiently detailed, it may be self-verifying, and one may conclude that the informer was not relying on mere rumor. 231 So. 2d at 783.

The affidavit in the case at bar reflects that the informer personally observed the marijuana at the petitioner's residence. To further substantiate his information, the informer furnished a sample of marijuana taken from the petitioner's residence to the affiant the day before the affidavit for the search warrant was made. Thus, the reliability of the information was established. Second, the reliability of the informer was also shown by the fact that affiant had, in the past, been furnished information by the informer which had been shown to be true and correct. Therefore, the affidavit meets both prongs of the **Aguilar** test. Moreover, the informer's information was corroborated by the personal observations of the affiant. The affiant saw several known marijuana users come and go from the residence in question. The affiant also stated that he personally knew that the petitioner and his house guest were users of marijuana. The affidavit clearly shows that the information known to the affiant was more than mere rumor. The affidavit presented adequate probable cause for the issuance of the search warrant.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied and that the judgment of the Mississippi Supreme Court be affirmed.

Respectfully submitted

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APPENDIX A

Thomas C. Boring, Jr. v. State of Mississippi
No. 46399

Miss., 253 So. 2d 251

Supreme Court of Mississippi

Sept. 27, 1971

Rehearing Denied Oct. 25, 1971

Defendant was convicted before the Circuit Court, Leflore County, B. B. Wilkes, Jr., of possession of marijuana and he appealed. The Supreme Court, Rodgers, P. J., held that affidavit which stated that informant had seen marijuana in place to be searched, that informant had furnished officer a sample of marijuana and that officer had personally observed known users of marijuana going to and from place sought to be searched stated facts sufficient to establish probable cause for issuance of search warrant.

Affirmed.

* * * * * * * *

W. S. Moore, Jackson, for appellant.

A. F. Summer, Atty. Gen., by Guy N. Rogers, Asst. Atty. Gen., and Velia Ann Mayer, Special Asst. Atty. Gen., Jackson, for appellee.

Rodgers, Presiding Justice.

The appellant Thomas C. Boring, Jr. was convicted in the Circuit Court of Leflore County, Mississippi, and sentenced to serve a term in the state penitentiary and to pay a fine for the crime of possession of marijuana.

The appellant has appealed to the court and now contends that the trial court committed reversible error in

permitting the introduction of evidence with reference to the discovery of marijuana on the premises of the appellant because the search warrant used to gain entrance to the property was obtained and served by a member of the Highway Patrol who, it is contended, had no authority to serve a search warrant, thus rendering the search illegal and the evidence secured thereby inadmissible at the trial. Moreover, it is said the affidavit made by the officer was insufficient to establish probable cause for the issuance of a search warrant.

The record shows that R. L. (Ronnie) White, an inspector for the Mississippi Highway Patrol, appeared before a Justice of the Peace and made an affidavit in which he testified that he had been given information from a reliable person who had previously given other information which proved to be true and correct, and who stated, among other things, that he had seen marijuana in the residence of Thomas Chester Boring, Jr., and that this informer had furnished affiant a sample of the drug.

A search warrant was issued by the Justice of the Peace addressed to any lawful officer of ———— County commanding him to search the premises described in the search warrant. The original and one copy of the search warrant were given to R. L. White, the Highway Patrol inspector. The inspector and members of the local police force of Greenwood, Mississippi, went to the home of appellant, and after they were refused permission to enter the premises, the inspector forcefully pushed his way into the house. The officers discovered marijuana and certain articles used in the preparation and use of marijuana. The marijuana and other articles were seized and R. L. White made a written return upon the original search warrant attaching an inventory of the seized contraband.

During the search of appellant's home he was arrested and properly warned not to make any statement. Appel-

lant without being questioned voluntarily told the officers "You caught me redhanded" and said, "I am guilty, it's mine." He also said, "There are four pounds there, two different kinds." He later said, "I paid a hundred dollars a pound."

One Mona Citro, a woman, was also arrested at the time of the search; she lived in the house and was present at the time of the search.

The appellant made a motion before the trial to suppress the evidence (under the rule in Henry v. State, 253 Miss. 263, 154 So.2d 289, 173 So.2d 348 (1965)) upon the ground that the search of appellant's home was illegal because there was no probable cause shown for the issuance of the search warrant. It was contended that the statements in the affidavit were insufficient to show probable cause. The trial court heard evidence upon the motion to suppress and overruled the motion. The case was continued and at the next term of court the appellant was tried. The trial court overruled a motion for a directed verdict upon the grounds originally argued in the motion to suppress the evidence. No new grounds were submitted to the trial court.

Upon appeal to this Court the appellant now contends, in addition to his original motion, that the inspector of the Highway Patrol had no authority to obtain and serve a search warrant for marijuana and that, therefore, evidence obtained by the officers was not admissible on the trial.

We do not here consider the last contention because it was not submitted to the trial court and is raised for the first time on appeal.

Objections to evidence must bring to the attention of the trial judge the specific ground on which it is contended such evidence is inadmissible so that the trial judge

may determine whether or not such evidence is available to objector's adversary.

The rule for requiring specific objections is necessary because to permit litigants to hold back objections until on appeal would mean that costly new trials would be had where valid objections could have been sustained during the trial. Roberds v. State, 187 So. 755 (Miss. 1939); Kimbrall v. State, 178 Miss. 701, 174 So. 47 (1937); Dobbs v. State, 167 Miss. 609, 142 So. 500 (1932); Williams v. State, 171 Miss. 324, 157 So. 717 (1934). This rule has been recognized by the Federal Court in this jurisdiction. Gann v. Smith, D.C., 318 F.Supp. 409 (1970).

In Cox v. State, 146 Miss. 685, 112 So. 479, at 481 (1927) where the affidavit failed to show that affiant "does believe that intoxicating liquor is being stored, etc." the Court said "the affidavit was not objected to on that ground in the court below, and consequently such an objection cannot be here considered."

We have said that where no objection was made in the trial court that a search warrant was not timely served, the objection cannot be raised in this court. Jordan v. State, 147 Miss. 24, 112 So. 590 (1927).

In the case of Conwill v. State, 147 Miss. 118, 120, 112 So. 868, 869 (1927) we said:

> "The defendant having made specific objection to the search warrant when offered in evidence, we do not think he is now entitled to raise questions which were not brought up for the decision of the court below."

In another case where the search warrant was not introduced this Court said:

> "It is too late to raise these questions. Appellant had full opportunity of raising them in the court below, and failed to do so. He chose on the trial to ob-

ject alone to the evidence on the specific ground that the affidavit failed to show whose property was to be searched for, not on the ground that the affidavit was not introduced in evidence. Questions will not be decided on appeal which were not presented to the trial court and that court given an opportunity to rule on them. In other words, the trial court cannot be put in error, unless it has had an opportunity of committing error." Boutwell v. State, 165 Miss. 16, 27-28, 143 So. 479, 482 (1932).

The appellant recognized the foregoing rule but contended that this Court should apply the "plain error" rule announced in Wright v. State, 231 So. 2d 777 (Miss. 1970). In that case we pointed out that we had previously held in Presley v. State, 229 So. 2d 830 (Miss. 1969) that an agent of the Alcoholic Beverage Control Division of the State Tax Commission did not have authority to serve a search warrant issued to search for gambling equipment. We, therefore, applied the "plain error" rule in *Wright*, supra.

We cannot say there was "plain error" committed by the trial court in the instant case since Section 8082, Mississippi Code 1942 Annotated (Supp. 1970), subsection 9, third paragraph, is in the following language:

"Provided, however, the additional powers herein granted to or vested in the Department of Public Safety or any of its officers or employees by subsection 9 of this section, excepting investigating powers, and those powers of investigators who shall have general police power, being the investigators in the Mississippi Livestock Theft Bureau, the Auto Theft Bureau, and the Identification Division of the Department of Public Safety, shall not be exercised by the Department of Public Safety, or any of its officers or employees, except upon authority and direction of

the Governor or Acting Governor, by proclamation duly signed, in the following instances, to wit:"

The Mississippi Legislature has the absolute authority to fix the qualifications of persons authorized to serve process. See cases collected under 72 C.J.S. Process § 27, p. 1027 (1951). We are of the opinion that the Legislature has granted authority to investigators named in the foregoing Code section to serve a search warrant.

We think the two paramount questions presented for our consideration are: (1) whether or not the trial judge should have excluded the evidence obtained by the search, because, the underlying facts and circumstances set forth in the affidavit on which the warrant, was issued, did not establish probable cause requiring the issuance of a search warrant; and (2) whether or not the trial court erred in refusing to permit the defendant to continue to ask a codefendant questions with references to the ownership of the articles seized by the officers after the witness had refused to answer such questions upon the ground the answers might tend to incriminate her.

The motion of the defendant, appellant here, to suppress the evidence properly raised the issue as to whether or not the search warrant was legally issued upon probable cause. The objection to the evidence and the motion for a directed verdict were based upon the grounds set forth in the petition to suppress the evidence. The underlying facts set forth in the affidavit were as follows:

"UNDERLYING FACTS AND CIRCUMSTANCES"

"A citizen of Leflore County, Mississippi, who I have known for about one year, who is of high moral character and has given me information in the past that has proven to be true and correct, told me that

Thomas Chester Boring Jr. had in his residence, located at 508 MacArthur Avenue, Greenwood, Mississippi, a dangerous narcotic, to wit, marihuana, and a marihuana processing device.

"This same citizen has seen marihuana in the above mentioned residence and has furnished me with a small sample of marihuana taken from the above mentioned residence. This sample was furnished me on January 30, 1970.

"I have personally observed several persons known by me to be marihuana users go to and from this residence.

"I personally know Thomas Chester Boring, Jr. and Mona Citro who also resides at 508 MacArthur Avenue, Greenwood, Mississippi, to be users of marihuana and other drugs."

It is, of course, elementary that an affidavit for a search warrant must be based upon evidentiary facts and that such facts must be of sufficient weight to establish probable cause for the search. It has been pointed out by one text writer that the evidentiary facts must be such as will lead a man of prudence and caution to believe that the offense has been committed but such evidence must not be so meager as to constitute merely the conclusion of the applicant and an invasion of the judicial function of the magistrate. 79 C.J.S. Searches and Seizures, § 74, p. 873 (1952):

This Court has said:

"The law does not authorize an officer to make a search on mere information of the informant, but the information must be communicated as a fact within the knowledge of the person communicating the information. In other words, a search warrant is not issued except on information amounting to probable cause,

and mere rumor is not sufficient to constitute probable cause." Elardo v. State, 164 Miss. 628, 632-633, 145 So. 615, 616 (1933); followed in Norman v. State, 167 Miss. 690, 146 So. 639 (1933).

The appellant contends that our discussion in Barker v. State, 241 So.2d 355 (Miss. 1970) and Strode v. State, 231 So.2d 779 (Miss. 1970) is controlling in the instant case, and entitles appellant to an acquittal. In Barker, supra, the statement made by the informer was to the effect that he had observed the defendant with marijuana cigarettes two weeks before at *another place* was not sufficient probable cause to believe marijuana was then kept in the place proposed to be searched.

In Strode v. State this Court, en banc, examined the various federal cases on the question of probable cause and said at page 782:

> "Probable cause exists when a police officer has personal knowledge and reasonably trustworthy reports of facts which are sufficient to warrant a reasonably cautious man's believing an offense has been or is being committed. The application for search warrant complies fully with the requirements of decisions of the United States Supreme Court and of this Court." (Citing many cases)

The search warrant issued to the officers in that case was based upon information obtained from an informant who was said to be reliable but whose identity the officers refused to divulge. We also pointed out in *Strode* that probable cause requires only a showing of probability.

The affidavit in the instant case not only says that the informant had seen marijuana in the residence, or place to be searched, but that the informant had actually furnished the officer a sample of the drugs; moreover, the officer had personally observed known users of marijuana go to and from the place sought to be searched.

The actual known facts plus the surrounding circumstances were such as to lead a reasonably prudent and cautious man to believe that the law was being violated and that contraband was being kept in the residence of the appellant at the time the search warrant was issued.

We are, therefore, of the opinion that the affidavit stated facts sufficient to establish probable cause resulting in the proper issuance of the search warrant here involved. The evidence obtained by the search was properly admitted to the jury on the trial of this case. We believe the facts here presented meet the requirements set forth in O'Bean v. State, 184 So.2d 635 (Miss. 1966), and are in accord with our holding in *Strode*.

The next point argued by the appellant is based upon an objection he made to the ruling of the trial court in refusing to permit the appellant to ask detailed questions with reference to the articles obtained in the search. Mona Citro, a woman who was in the home of the appellant and present at the time of the search, was arrested and indicted along with the appellant on a charge of possession of marijuana. The appellant offered her as a witness after the State had closed its case, but she refused to testify upon the ground that her testimony might tend to incriminate her. The appellant, however, insisted that he had a right to ask her in detail about each article exhibited and obtained in the search. Apparently, the appellant wanted her to say that if she answered the question as to whether or not she was in possession of each article her answer might tend to incriminate her and that such an answer would tend to be an admission of her guilt and the innocence of the appellant.

It has been pointed out in the federal jurisdictions that the invocation of the Fifth Amendment privilege against self-incrimination does not give rise to an inference of guilt. United States v. Tomaiolo, 249 F.2d 683 (2d Cir.

1957); United States ex rel. Belfrage v. Shaughnessy, 212 F.2d 128 (2d Cir. 1954); United States v. Atnip, 374 F.2d 720 (7th Cir. 1967).

We are of the opinion that the trial court was correct in refusing to require the witness to answer questions in detail before the jury about the circumstances surrounding the alleged crime for which she was under indictment. After the witness had claimed her privilege to remain silent it was the duty of the trial court to protect the witness against any further effort to require her to incriminate herself by her own testimony. Hutchins v. State, 212 Miss. 145, 54 So.2d 210 (1951). Compare Holman v. State, 72 Miss. 108, 16 So. 294 (1894).

From the foregoing authorities we have reached the conclusion that there is no reversible error shown in the record of this case and for that reason the judgment of the trial court must be affirmed.

Affirmed.

Jones, Brady, Smith and Sugg, JJ., concur.